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No. 83-1309

L. STEVENS
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In the Supreme Court of the United States
OCTOBER TERM, 1988

JOHN DOE, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's lawyer was permitted by the attorney-client privilege to refuse in testimony before a grand jury investigating possible tax fraud to identify petitioner as the person who requested the lawyer to incorporate several corporations and dealt with the lawyer on legal matters affecting the corporations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 722 F.2d 303. The opinion and order of the district court (Pet. App. 15a-25a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1983 (Pet. App. 18a). The petition for a writ of certiorari was filed on February 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

STATEMENT

On May 2, 1980, a grand jury sitting in the Northern District of Ohio issued a subpoena ad testificandum to attorney Larry S. Gordon. The grand jury was conducting a tax investigation that focused on the financial affairs of one Reuben Sturman and several corporations believed to be under Sturman's control. Gordon appeared on the scheduled date and, in the course of his testimony, identified 12 corporations as having been incorporated by his law firm and four additional corporations as clients of the firm. Gordon further testified that the law firm had housed the records of these corporations for a period of time, but that the records had been removed in January 1978. In addition, Gordon acknowledged that Sturman was a client of the firm (Pet. App. 1a-2a).

Asserting the attorney-client privilege, however, Gordon refused to identify the individuals with whom the law firm dealt in connection with these corporations (Pet. App. 2a, 15a-16a). Accordingly, on January 22, 1982, the government petitioned the district court to compel Gordon to respond to the following requests for information (Pet. App. 2a-3a):

1. identify the person or persons who requested each incorporation;
2. identify the person or persons who provided the law firm with information concerning the identity of the officers and shareholders of each corporation;
3. identify the agent or representative the firm dealt with when legal matters arose concerning each of the named corporations; and

4. identify the person or persons who requested and/or received custody of the records of each corporation removed from the law firm in January, 1978.

On March 15, 1983, the district court permitted petitioner "John Doe" to intervene for purposes of allowing him to assert the attorney-client privilege against disclosure of the information. The court allowed intervention on the basis of an in camera affidavit submitted by petitioner averring that he was the individual client whose identity was sought by the grand jury (Pet. App. 3a).¹

On March 29, 1983, the district court granted the government's motion to compel Gordon to answer the four questions posed by the grand jury, concluding that the answers would not constitute an invasion of the attorney-client privilege (Pet. App. 25a). The court explained that the privilege extends only to confidential communications and that, as a consequence, a client's identity is not ordinarily protected by the privilege (Pet. App. 17a). The court noted that an exception to this general rule has been recognized by some courts where the person invoking the privilege makes a showing of a "strong possibility" that disclosure of the client's identity "would implicate the client in the very criminal activity for which legal advice was sought" (Pet. App. 18a), but the court concluded that no showing had been made in this case that disclosure of the client's identity would result in the client's incrimination in any criminal activity relating to the incorporation of the corporations (Pet.

¹ The affidavit apparently did not claim that petitioner was the individual referred to in the fourth category of information sought (see Pet. App. 10a, 16a).

App. 21a-22a). The court noted that attorney Gordon had not so argued; that nothing in petitioner's in camera affidavit suggested that "the danger of incrimination is so great that the secrecy of [petitioner's] identity should be preserved"; and that "[i]ndeed representations in this affidavit suggest that the opposite is true" (Pet. App. 21a-22a). The district court also concluded that, on the basis of the record, it could not accept petitioner's further contention that the disclosure of his identity would supply the government with "the last link in an existing chain of incriminating evidence likely to lead to the client's indictment" (*ibid.*, quoting *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc)).³

Petitioner appealed the district court's order directing his attorney to answer the four questions, and the court of appeals affirmed (Pet. App. 12a).⁴ The

³ The government had urged that, even if the attorney-client privilege were held to apply, this case would fall within the "crime or fraud" exception to the privilege. That exception applies when the attorney-client relationship is used to further a present or future illegal or fraudulent activity, regardless of whether the attorney is aware of the client's actions (Pet. App. 19a, 22a). See, e.g., *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d at 1027. Because the district court held the attorney-client privilege inapplicable in the first instance, it recognized that it was unnecessary to reach the government's alternative argument (Pet. App. 22a). The court nevertheless suggested that the affidavits submitted by the government were insufficient to constitute a *prima facie* case that the "crime or fraud" exception applied (Pet. App. 22a-24a).

⁴ The court of appeals, relying upon *Periman v. United States*, 247 U.S. 7 (1918), held that the order was final and appealable by the client under 28 U.S.C. 1291 (Pet. App. 6a-7a). As the court below recognized (Pet. App. 4a), the

court of appeals recognized the general rule that a client's identity is not normally within the scope of the attorney-client privilege, but, like the district court, it recognized an exception to this general rule if the person asserting the privilege is able to show a "strong possibility" that disclosure of the client's identity would implicate him in the very matter respecting which legal advice was sought in the first place (Pet. App. 7a, citing *In re Grand Jury Investigation No. 83-2-35 (Durant)*, 723 F.2d 447 (6th Cir. 1983), petition for cert. pending, No. 83-1468). However, the court of appeals affirmed the district court's holding that this exception is inapplicable on the facts of this case. It explained that "[t]he record, including the *in camera* affidavit of [petitioner], discloses that [petitioner] sought legal assistance to incorporate several companies" and that "[t]here is no criminal implication arising from [petitioner's] having directed an attorney to incorporate a number of business enterprises" (Pet. App. 8a).

The court of appeals also noted that in its companion decision in *Durant*, it had recognized another exception to the general rule that a client's identity is not privileged. This exception applies "where disclosure of the identity would be tantamount to revealing an otherwise confidential communication" (Pet. App. 8a (quoting 723 F.2d at 453))—i.e., "where so much of the actual communication has already been disclosed that identification of the client amounts to disclosure of a confidential communication" (Pet. App. 8a, quoting *NLRB v. Harvey*, 349 F.2d 900, 905 (4th Cir. 1965)). But the

courts of appeals are divided on this jurisdictional question. We have not sought review of the court of appeals' jurisdictional holding.

court of appeals held that this exception also is inapplicable in the circumstances of this case. With respect to the first question posed by the grand jury, for example, the court stated that the order simply required attorney Gordon to name the person who engaged him to incorporate each corporation. The court explained that disclosure of petitioner's identity would merely amount to a disclosure of the general scope and object of the legal employment undertaken by Gordon in incorporating the companies on petitioner's behalf—information that traditionally has been held not to be protected by the attorney-client privilege. Pet. App. 8a-9a (citing McCormick, *Evidence* § 90 (2d ed. 1972); 2 Weinstein, *Weinstein's Evidence* ¶ 503(a)(4)[02] (1982); *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); and *United States v. Mackey*, 405 F. Supp. 854, 859 (E.D.N.Y. 1975)). The answers to the other questions posed by the grand jury likewise were held not to require the disclosure of confidential information and thus not to be protected by the second exception the court recognized.⁴

⁴ The second question requested the identity of the person who supplied Gordon with the names of the officers and shareholders of the various corporations—information that the court of appeals explained is “‘clearly a matter of corporate record [and] * * * not normally the kind of confidential information which is subject to the attorney-client privilege’” (Pet. App. 9a (quoting *United States v. Mackey*, 405 F. Supp. at 859)). Because the substance of the communication is not confidential, the court of appeals reasoned, revelation of the identity of the person who made it would not amount to disclosure of confidential information (Pet. App. 9a). The third question requested Gordon to state with whom the law firm communicated regarding “legal matters” involving the corporations. The court held that because there had been no dis-

ARGUMENT

The decision of the court of appeals rejecting petitioner's assertion of the attorney-client privilege to prevent his lawyer from being required to disclose petitioner's identity is correct and does not conflict with any decision of this Court or any court of appeals. Further review of this claim therefore is not warranted.

1. This Court has made clear in the very cases upon which petitioner relies (Pet. 6-7)—*Upjohn v. United States*, 449 U.S. 383 (1981), and *Fisher v. United States*, 425 U.S. 391 (1976)—that the attorney-client privilege protects only confidential communications made by a client to his lawyer for the purpose of obtaining legal advice. 449 U.S. at 389-390; 425 U.S. at 403. Petitioner does not challenge (see Pet. 7) the observation by the court below (Pet. App. 7a) that the courts of appeals have unanimously embraced the general rule that the identity of the client accordingly is not within the scope of the attorney-client privilege because disclosure of the client's identity does not ordinarily entail the disclosure of confidential communications made by the client. See generally U.S. Br. in Opp. 5-8, 10, *Durant v. United States*, petition for cert. pending, No. 83-1468. Nor does petitioner challenge the holding by

closure of communications between Gordon and the corporate representative concerning substantive legal issues, disclosure of the identity of the corporate representative would not have the effect of revealing any confidential communications he made (Pet. App. 9a). Finally, the court held that the fourth question—which simply asked to whom the corporate materials had been returned—did not implicate client communications at all. The court also noted that petitioner did not assert that the fourth question even referred to him (*id.* at 9a-10a).

the court below that disclosure of his identity in the circumstances of this case would not have the effect of revealing the substance of any confidential communications he made to attorney Gordon (Pet. App. 8a-9a; see page 6 & note 4, *supra*) and that this case therefore does not fall within what the court of appeals termed an "exception" permitting a lawyer to withhold the identity of a client where disclosure would be tantamount to revealing a confidential communication (Pet. App. 8a).⁸ Because no confidential communications are implicated here, it necessarily follows that the court of appeals correctly rejected petitioner's claim of privilege.

Petitioner contends (Pet. 6-7, 10-11) that this result is inconsistent with this Court's decision in *Fisher*, which, he asserts, requires application of the attorney-client privilege whenever information might incriminate the client and thus could not, under the Fifth Amendment, be compelled from the client himself. In this case, petitioner asserts, he could not be compelled to testify before the grand jury with respect to whether he had requested incorporation of the companies or otherwise dealt with the law firm

⁸ Logically, application of the privilege in such a case should not be viewed as an "exception" to a general rule that a client's identity is not privileged, because even in such a case the client's identity does not become privileged in its own right. Rather, the attorney is permitted to withhold the identity of the client only because its disclosure in turn would reveal a confidential communication that is protected by the privilege. Thus, the "exception" the court of appeals identified is in reality an application of the fundamental principle of the privilege itself that confidential communications are protected from disclosure. See *In re Osterhoudt*, 722 F.2d 591, 593-594 (9th Cir. 1983).

regarding them because his answers might be incriminating; accordingly, petitioner's argument proceeds, his attorney cannot be required to disclose that information. This argument amounts to nothing more than that an attorney may vicariously assert his client's Fifth Amendment privilege, a proposition that this Court emphatically rejected in *Fisher*. 425 U.S. at 396-401.

Thus, in the Fifth Amendment context, the Court in *Fisher* rejected the argument that a lawyer is privileged from releasing documents merely because they might incriminate his client. Contrary to petitioner's contention, *Fisher* did not then proceed to recognize precisely the same rule under the rubric of the attorney-client privilege. To have made application of the attorney-client privilege turn in that manner on whether the information would incriminate the client would have divorced the privilege from its purpose of protecting confidential communications. The Court obviously did not, *sub silentio*, so radically alter the basis of the attorney-client privilege. Instead, the Court in *Fisher* actually reiterated the established principle that the privilege should be applied strictly to protect only confidential communications. 425 U.S. at 403-404. The Court then applied that general principle to hold that where a client transfers documents that are themselves privileged to his attorney, for the purpose of obtaining legal advice, that transfer is like any other confidential communication of information by a client to a lawyer and thus the substance of the communication is equally protected by the attorney-client privilege. 425 U.S. at 404-405. The Court did not suggest that the attorney-client privilege would apply even where, as here, the

necessary predicate for application of the privilege—the potential disclosure of a confidential communication—is wholly absent. In sum, as the Seventh Circuit recently explained, "the Supreme Court's analysis of the privilege in *Fisher* focused only on the protection of confidential communications. Whether the information sought amounted to a protected 'communication' was not made to depend on whether disclosure of the information would have incriminated the client." *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d 489, 491-492 (7th Cir. 1984). Petitioner's reliance on *Fisher* is therefore wholly misplaced.

2. Petitioner next contends (Pet. 9-11) that the Court should grant certiorari to resolve a conflict in the circuits on the question whether there is an exception to the general rule that the identity of the client is not privileged where disclosure of the client's identity would provide the "last link" in a chain of incriminatory evidence that might lead to his client's indictment. This exception, he asserts, is "well established" in the Fifth Circuit (see Pet. 9-10, citing *In re Grand Jury Proceedings (Pavlick)*, 680 F.2d 1026, 1027 (1982) (en banc)), and was adopted "as pronounced in *Pavlick*" by the Eleventh Circuit in *In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351, 1352 (1982). See Pet. 10. As we explain in our Brief in Opposition in *Durant* (at 13-21), however, there is no conflict among the circuits on this question. The courts of appeals, including the Fifth and Eleventh Circuits, have not announced a departure from the central principle that the attorney-client privilege applies to disclosure only of confidential communications and that the identity of the client

accordingly is privileged only where such communications would be disclosed.*

Moreover, the Seventh and Ninth Circuits, in recent decisions reexamining the basis of prior precedent, have each concluded that the privilege protects the identity of the client only where confidential communications would be revealed. *In re Witnesses Before the Special March 1980 Grand Jury*, 729 F.2d at 492-495; *In re Osterhoudt*, 722 F.2d at 593-594. Significantly, the Ninth Circuit made clear in *In re Osterhoudt* that its own prior decision in *Baird v. Koerner*, 279 F.2d 623 (1960)—which the courts uniformly have viewed as the seminal decision in this area and which has given rise to the asserted “ex-

* Contrary to petitioner's assertion (Pet. 10), the Eleventh Circuit in *Twist* did not adopt the Fifth Circuit's reasoning in *Pavlick* with respect to whether the client's identity is privileged; it adopted the reasoning in *Pavlick* only with respect to the distinct “crime or fraud” exception to the attorney-client privilege. 689 F.2d at 1352. Moreover, the Eleventh Circuit's subsequent opinion in *In re Grand Jury Subpoena (Slaughter)*, 694 F.2d 1258, 1260 (1982), in fact explicitly stresses that the privilege applies only where confidential communications would be disclosed. The Fifth Circuit's opinion in *In re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975), also indicates that the potential for disclosure of confidential communications has a bearing on the application of the privilege to the client's identity. 517 F.2d at 669, 672-673, 674-675. Although dicta in *Pavlick*, in which the Fifth Circuit actually *rejected* the claim of privilege, refers to whether the client's identity forms the “last link” of incriminating evidence (680 F.2d at 1027), the Fifth Circuit did not state that the disclosure of confidential communications had no bearing on this question. Moreover, the separate opinions in *Pavlick*, joined by a majority of the judges, all discuss the relevance of the disclosure of confidential communications. *Id.* at 1029, 1030, 1033.

ception" to the general rule that the client's identity is not privileged—likewise was based on the fact that disclosure of the client's identity would effectively have revealed confidential communications. 722 F.2d at 593-594. Because other courts, including the Fifth and Eleventh Circuits, in the past have relied extensively upon *Baird*, it seems likely that the recent Seventh and Ninth Circuit decisions clarifying the governing principles and the meaning of *Baird* will dispel whatever confusion may linger in the lower courts as a result of the dicta in *Pavlick* referring to whether the client's identity furnishes the "last link" of incriminating evidence.⁷ Review by this Court therefore plainly is not warranted at this time.

This case would not be a suitable vehicle for consideration of these issues by the Court in any event, because the district court explicitly held that petitioner had failed to establish "that disclosure of the identity of John Doe would supply the government with 'the last link in an existing chain of incriminating evidence likely to lead to the client's indictment'" (Pet. App. 25a (quoting *Pavlick*, 680 F.2d at 1027)). Thus, even if a distinct "last link" exception were to be recognized in cases in which confidential communications would not be revealed, that exception would be inapplicable in this case by virtue of the district

⁷ That incrimination is not the true basis for the principle expressed in *Baird* is evident from considering the situation in which embarrassing but non-criminal communications have been revealed by the attorney, and identification of the client would provide the "last link" connecting the client to the embarrassing disclosures or exposing him to potential civil liability. Even though disclosure of identity would then carry no risk of incriminating the client, it can hardly be doubted that the *Baird* principle would render disclosure of the client's identity subject to the privilege.

court's finding, which was not disturbed by the court of appeals.

In addition, whatever might be the merits in other settings of a "last link" exception permitting a lawyer to refuse to disclose the identity of his client even where confidential communications would not be revealed,^{*} there is nothing to commend such an exception in the circumstances of this case. Petitioner did not seek the assistance of a lawyer for purposes of obtaining legal advice in connection with matters that thereafter remained confidential. To the contrary, as petitioner concedes (Pet. 8-9), he engaged the law firm for purposes of performing the public and official act of incorporating the 12 corporations in question. Just as a party and the public have a right to know on whose behalf a lawyer acts when he appears in litigation (see McCormick, *Evidence* § 90 (2d ed. 1972); 8 Wigmore, *Evidence* § 2313 (McNaughton rev. ed. 1961); cf. *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 295 (1826)), so too do persons directly affected and the public have a right to know on whose behalf a lawyer acts in openly invoking the established statutory procedure for creating a corporation. If petitioner had personally incorporated the corporations, without resort to a lawyer's assistance, his identity clearly would not be protected by any common law privilege from disclosure to the grand jury. The result should be no different simply because he has engaged someone else—whether an attorney or lay person—to perform that act for him.

* We argue in our Brief in Opposition in *Durant* (at 8-13) that such an exception is not supported by the privilege's purpose of protecting confidential communications.

This makes clear that what petitioner actually seeks is a privilege enshrouding in secrecy the relationship of principal and agent, not that of attorney and client, for “[w]hat clients *do* and what lawyers *do* generally is not privileged; only what they say to each other falls within the protection of the privilege.” *Salzburg, Communications Falling Within the Attorney-Client Privilege*, 66 Iowa L. Rev. 811, 824 (1981) (emphasis added). “In this type of case, the concealment of identity would tend to allow persons to engage in activities that ordinarily would be subject to inquiry and to insulate themselves from otherwise proper scrutiny.” *Id.* at 823. Petitioner therefore has advanced no sound basis for a claim that his identity should be privileged from disclosure to the grand jury in the circumstances of this case.

3. Nor is there any merit to petitioner’s final contention (Pet. 11-14) that review by this Court is appropriate in light of the new Model Rules of Professional Conduct adopted by the American Bar Association on August 2, 1983. Petitioner relies (Pet. 12-13) on language in Model Rule 1.6 providing that a lawyer “shall not reveal information relating to representation of a client unless the client consents after consultation * * *.” The reference to information “relating to” the representation, petitioner argues, is broader than the scope of the attorney-client privilege as recognized by the courts, because it applies “‘not merely to matters communicated in confidence * * * but also to all information relating to the representation, whatever its source’” (Pet. 12, quoting the Commentary to Rule 1.6 (52 U.S.L.W. 1, 6 (Aug. 16, 1983))). Accordingly, petitioner seems to contend, Model Rule 1.6 was intended to expand

the scope of the attorney-client privilege. This argument is wholly without merit.

The Preamble to the Model Rules explicitly states that the Rules "are not intended to govern or affect judicial application of either the attorney-client or work product privilege" (52 U.S.L.W. at 2). Moreover, the Commentary to Rule 1.6 explains that the attorney-client evidentiary privilege and the rule of confidentiality as a matter of professional ethics and discretion are distinct and that the latter is broader than the evidentiary privilege because it is not limited to matters communicated by the client in confidence (52 U.S.L.W. at 6). In this respect the Model Rules do not differ from Canon 4 of the predecessor Model Code of Professional Responsibility (1969), which likewise recognized that "[t]he attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client" (EC 4-4). It is not surprising that a generalized principle of professional confidentiality relating to a client's affairs would sweep more broadly than an evidentiary privilege. Thus, the fact that the rules of professional conduct might forbid a lawyer from gratuitously disclosing to the public or his acquaintances the identity of a client who prefers to remain anonymous does not mean that the evidentiary privilege would permit him to withhold that information from a grand jury. The ABA's adoption of the Model Rules to replace the Code of Professional Responsibility therefore has no effect whatever on the issues presented in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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